CERTIFICATE OF COUNSEL FOR PETITIONER

As a member of the bar of this Court, I hereby certify that I have examined the foregoing petition, and in my judgment it is well founded and not interposed for delay.

.....

GREIG SCOTT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINIONS OF THE COURTS BELOW

No opinion was rendered or filed by the District Court of Arizona. The Judgment of said District Court determining the issues in favor of petitioner and against respondents herein, was rendered and filed on September 24, 1943 (R. 318-321).

The opinion of the Circuit Court of Appeals for the Ninth Circuit (Judges Denman, Mathews and Stephens; Judge DENMAN writing), was filed June 30, 1944, and appears at pages 332-344 of the Record. On July 19, 1944, Judge MATHEWS filed a special concurring opinion (R. 344-a-344-b). By such special opinion, Judge MATHEWS concurred in the result, but not in the reasoning of his associates, Judges Denman and Stephens. The Judgment of the Circuit Court of Appeals, however, reversing the District Court of Arizona, was entered on June 30, 1944 (R. 354).

JURISDICTION

The jurisdiction of this Court is invoked under

Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229 (43 Stat. 938; Tit. 28 U.S.C.A. Sec. 347). The Judgment of the Circuit Court of Appeals was entered June 30, 1944. No Petition for Rehearing was filed. This petition for writ of certiorari was filed....., 1944, and within three calendar months after the entry of said Judgment of the Circuit Court of Appeals.

The District Court of the United States for the District of Arizona held (R. 318-321): (1) That in the performance by respondents, and each of them, of the services for petitioner, mentioned in their complaint, none of said respondents, during the period of time set forth in said complaint, were engaged in commerce, or the production of goods for commerce, or in an occupation necessary to the production thereof, within the meaning of the Fair Labor Standards Act of 1938; (2) that in the carrying on of its business and operations, as found by said Court, petitioner was a service establishment, the greater part of whose service is in intra-state commerce, and by reason thereof respondents, and each of them, are exempted from the provisions and benefits of said Act; (3) that such of respondents as are employed by petitioner in the capacity of zanjeros are outside salesmen within the meaning of said act, and exempted from the provisions and benefits of said Act.

By its Opinion and Judgment above mentioned, the Circuit Court of Appeals for the Ninth Circuit reversed the District Court upon each of said findings.

STATEMENT OF THE CASE

The essential facts of the case are fully stated in the accompanying petition for certiorari and in the interest of brevity are not repeated here. Any necessary elaboration of the evidence on the points involved will be made the course of the argument which follows.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred:

1. In reversing the judgment of the District Court and holding that respondents were engaged in the production of goods for commerce within the scope and meaning of the Fair Labor Standards Act of 1938.

2. In reversing the judgment of the District Court and holding that respondent pump operators were engaged in commerce or in the production of goods for commerce within the scope and meaning of said Act, by reason of the fact that a portion of the electrical energy utilized for the operation of such pumps may have been generated without the State of Arizona, and in the performance of such duties, said respondent pump operators were engaged in bringing electricity into the State of Arizona.

SUMMARY OF THE ARGUMENT

POINT A.

RESPONDENTS NOT ENGAGED IN THE PRODUCTION OF GOODS FOR COMMERCE WITHIN

SCOPE OF FAIR LABOR STANDARDS ACT OF 1938. (Based on specification of error No. 1).

ARGUMENT

With but one exception (covered under Point B), the Judgment of the Circuit Court of Appeals is grounded upon the proposition that respondents, in the performance of their duties as employees of petitioner, are engaged in the production of goods for commerce within the scope and meaning of the Fair Labor Standards Act of 1938, particularly Section 3 (j) of said Act, defining the term "Produced", as used therein. In arriving at the result which it did in the determination of this case, the Circuit Court of Appeals purported to follow and be guided by this Court's decision in Kirschbaum v. Walling, 316 U. S. 517, 62 S. Ct. 1116, 86 L. Ed. 1638, holding that employees of a landlord renting space to tenants engaged in commerce or in the manufacture of goods for interstate commerce, were within the scope of the Act under consideration.

With the greatest respect for the Ninth Circuit Court of Appeals and the ability of the several members thereof, petitioner feels, in the decision of this case, it overlooked or failed to apply certain highly significant rulings of this Court in the Kirschbaum case, supra. In its opinion in that case this Court held that no hard and fast rule can be laid down in the determination of whether activities of employees, in a given employment, are within or without the scope of the Fair Labor Standards Act; that such determination can only be made upon a consideration of the facts and circumstances of each case as it arises;

that the activities of the employee must have a close and immediate, as distinguished from a tenuous, tie with the process of production for commerce.

Whether or not petitioner is engaged in commerce is immaterial to the issue presented. We are concerned here solely with the activities of the employees parties to this action.

McLeod v. Threlkeld,
319 U. S. 491;
63 S. Ct. 1248, 1250;

Overstreet v. North Shore Corp.,
318 U. S. 125;
63 S. Ct. 494, 498.

Higgins v. Carr Bros. Co.,
317 U. S. 572,
63 S. Ct. 337.

Kirschaum v. Walling,
316 U. S. 517, 524;
62 S. Ct. 1116, 1120;
86 L. Ed. 1638.

Warren-Bradshaw Drilling Co. v. Hall,
317 U. S. 88;
63 S. Ct. 125;
87 L. Ed.....

Directly, neither petitioner nor respondents, its employees, produce any goods or commodities in commerce. It, through the medium of its employees, acts as a delivery instrumentality of irrigation water, the property of its constituent members, to their lands.

None of such irrigation water can be said to go into commerce, unless we adopt the rather extreme reasoning of the writer of the Circuit Court's decision in this case, (with which one member of the Court was unable to agree (R. 344-b)), that vegetables and crops produced contain quantities of such water. The question for determination, therefore, is whether the indirect acts of these respondents in conducting irrigation water to the premises of petitioner's members, or in the maintenance and upkeep of the facilities whereby such delivery is made possible, are engaged in a process or occupation necessary to the production of goods within the meaning of Section 3 (j) of the Fair Labor Standards Act.

Respondents are employees of petitioner, not of its constituent members, shareholders, landowners, or whatever they may be called, and, unless long standing rules regarding separate corporate entity are to be discarded, cannot be deemed employees of the latter. When irrigation water is delivered by petitioner to the lands of its members, its jurisdiction and control ceases (R. 143). It has no voice in the use made thereof by the shareholder, the crops, if any, grown by him thereby, or in the dispostion of such crops when grown:—whether consumed by the shareholder, sold and consumed in local commerce, or turned into the stream of interstate commerce. Although quantities of the products of the soil grown in the Salt River Project find their way into commerce, on the other hand, much thereof is consumed locally. (R. 161-162; 258; 310-314). No one, least of all petitioner herein, can say whether water delivered to a particular farm will produce crops which will ultimately enter into such commerce. (R. 309-310).

The fact that the activities of respondents may "affect interstate commerce" is not, under the unbroken line of decisions of this Court, sufficient to bring them under the Act in question. (see cases previously cited).

Petitioner, in applying for certiorari in this case, is not unmindful of the rule that no mathematical or rigid formula can be laid down for determining in all cases whether a particular employee is or is not engaged in a process or occupation necessary to the production of goods for commerce. However, if the fundamental constitutional concepts of intra and interstate commerce are to be preserved, purely local employments and activities, such as those of respondents here, must be recognized accordingly. If petitioner's employees who clean ditches and zanjeros who run water down such ditches, are to be deemed engaged in the production of goods for commerce because that water grows crops which may or may not ultimately find their way into commerce, it would appear that the basic concept of "intra" as distinguished from "inter" state commerce, is but a fiction and a theory.

If, as declared by this Court, to have that effect, respondents' activities must have a "close and immediate (as distinguished from a "tenuous") tie with the process of production for commerce, we submit that the evidence fails to establish such connection.

POINT B.

RESPONDENT PUMP OPERATORS NOT ENGAGED IN COMMERCE OR IN THE PRODUCTION OF GOODS FOR COMMERCE

(Based on Specification of Error No. 2)

Insofar as the claim that respondent pump operators are engaged in the production of goods for commerce by reason of the fact that water pumped by them is utilized in the production of crops which may or may not ultimately go into commerce, we adopt our argument under Point A. However, the Circuit Court of Appeals in its determination of this case, (R. 332-344; specifically 339), held that respondent pump operators "in addition to supplying water to appellee's (petitioner's) shareholders, are engaged in bringing electricity into the state." —hence, in interstate commerce. As previously pointed out in the Summary Statement, and uncontradicted in the evidence (R. 277-278), respondent pump operators have nothing whatever to do with either the generation or distribution of electrical energy by petitioner, unless the reasoning of the writer of the Circuit Court's opinion that "whenever these employees switch on the pumps they cause electricity originating outside the State of Arizona, to flow through appellee's (petitioner's) lines", has that effect. If such ruling be correct, then by that fact alone, every man, woman and child in the Salt River Valley of Arizona is engaged in interstate commerce, for none can say whether or not the electrical energy so utilized came from without the State of Arizona. As shown by the evidence (R. 285-286), the power acquired by purchase by petitioner from the United States, is commingled with the much larger quantities generated locally by petitioner's works, hydro, steam or Diesel, and no one can say, in using such power, whether it is an inter or intra-state product. Under the contract between petitioner and the United States, the so-called "out of state power" is

delivered to petitioner's system by the government, or an instrumentality of the government, within the State of Arizona (R. 280, 285).

Under numerous decisions of this Court, whether a particular employee is to be deemed within the scope of the Fair Labor Standards Act is dependent solely upon the duties performed by such employee—not those performed by other employees, or upon the size, nature an dextent of his employer's business. (see cases cited, supra). Such of petitioner's employees as are actually engaged ni the generation, transmission and distribution of electric power are not parties to this proceeding. Petitioner submits that respondent "pump operators", under any reasonable construction of the Act in question cannot be deemed engaged in commerce or in the production of goods for commerce because they flick a switch which may or may not utilize electricity originating without the State of Arizona, or pump water which may or may not grow crops which may or may not ultimately go into interstate commerce. On the contrary, petitioner most earnestly contends that these, as well as all of respondents, are engaged in local and intra-state activities which, although possibly affecting commerce, do not constitute commerce or the production of goods of commerce.

IN GENERAL

If all such classes of labor involved in this case came within the provisions of the Fair Labor Standards Act, then all persons who deal with farmers come within the provisions of the Act. A person who sells the farmer a load of fertilizer, or tools with which the

farmer work, then comes within the provisions of the Act.

The great majority of all crops and other products raised and grown on the farms in the Salt River Valley are shipped by rail. All of the vegetable crops are so shipped for the reason that there is no other method of shipment. We believe that the cook who prepared the meals for the Raliroad Construction Gang (Mc Leod v. Threlkeld, 319 U. S. 491; 63 S. Ct. 1248, 1250;) was engaged in interstate commerce or in an occupation necessary for the productions of goods for commerce, just as much as the Zanjero who directed the running of the water in the case at bar. It is significant that the trial judge in this case thought that it was analogous to, and came within, the provisions of the McLeod v. Threlkeld case in rendering his decision.

CONCLUSION

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a write of certiorari, and thereafter reversing the decision of the Ninth Circuit Court of Appeals herein.

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.....

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IN THE

Supreme Court of the United States

OF THE

OCTOBER TERM, 1944

No. 439

SALT RIVER VALLEY WATER USERS' ASSOCIATION,
a corporation,

Petitioner,

vs.

CHARLES F. REYNOLDS, et el,

Respondents.

RESPONDENT'S REPLY BRIEF TO PETITION FOR WRIT OF CERTIORARI.

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